Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

ANTHONY ANDREJIC,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) After a criminal conviction and during post-trial proceedings, whether or not the letter and / or the spirit of the 5th and 6th Amendments have been violated to such a degree as to warrant a new trial when the state has engaged in practices, implemented as a standard modus operandi, which consist of:

(a) relying upon individuals enlisted in their confidential informant program for evidence and rewarding these individuals by ignoring criminal activity committed by the informant or issuing probation in lieu of prison time, thereby giving them an incentive to lie;

(b) prompting the superficial appearance of criminal conduct that never in fact occurred or would never occur without prodding;

(c) prosecutorial misconduct inextricably intertwined with an inept, ineffective and unprepared criminal defense trial counsel;

(d) intentionally suppressing highly exculpatory evidence from defense counsel;

(e) encouraging and condoning perjury committed by a state law enforcement officer;

(f) knowingly arguing to the jury during final summation by the prosecution that patently false evidence was true; and

(g) after a number of constitutional violations are conclusively established in post trial proceedings and are fully apparent upon the record, trial, appellate and the Ohio Supreme Court all don blinders and proceed to ignore, gloss over or condone these prosecutorial

practices, which quickly become perpetrated through routine affirmative decisions and, through Stare Decisis, acquire precedential value that is difficult, if not impossible for appellate counsel to overcome;

(h) creating a precedent for other courts to follow, permitting future cases to be conducted just as lawlessly;

resulting in a manipulated prosecution preserving the conviction for a phantom crime.

LIST OF PARTIES

The following list identifies all parties before the Eighth Appellate District of Ohio, which incorporates Cuyahoga County and the City of Cleveland.

Anthony Andrejic, appellant below, is an Ohio inmate in the custody of the Ohio Department of Rehabilitation and Correction. The State of Ohio, appellee, is represented by the Cuyahoga County Prosecutor's Office.

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In The Supreme Court of the United States

ANTHONY ANDREJIC,

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

Anthony Andrejic respectfully petitions for a writ of certiorari to review the order of the 8th Appellate District Court of Ohio after the Ohio Supreme Court declined to exercise jurisdiction.

OPINIONS BELOW

This petition arises from the trial of Anthony Andrejic in Case No. 492317 of the Cuyahoga County Court of Common Pleas on April 16, 2001. The case was appealed to the 8th Appellate District of Ohio in Cuyahoga County, domicile of Cleveland, resulting in the first of two written but unpublished appellate decisions, assigned Appellate Case No. 79700. In a petition for a new trial, a second written opinion was written by a panel of the Eighth Appellate District of Ohio, and this second appellate decision was assigned

case No. 84093. This 2nd appellate decision was appealed in a timely manner to the Ohio Supreme Court, where it was assigned case No. 04-1868. On February 16, 2005, jurisdiction was declined and no written opinion was issued by Ohio's Supreme Court on the merits of this matter.

JURISDICTIONAL STATEMENT

In accordance with Rule 10, subparagraph (c), this case may be reviewed for the reason set forth below:

> "a state court has decided an important question of federal law that has not been, but should be, settled by this Court."

The Ohio Supreme Court's Entry declining jurisdiction was filed February 16, 2005.[1] It is respectfully submitted that this petition for certiorari is being filed within 90 days of this judgment in accord with Rule 13(1). Statutory authority for reviewing this case has been conferred by 28 U.S.C. §1254(1). The United States is not a party to this proceeding and the constitutionality of an Act of Congress is not being challenged. Hence, the special filing and service requirements imposed by Rule 29.4(b) or (c) are not applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two constitutional provisions, the 5th Amendment of the United States Constitution, quoted below.

> "No person shall be held to answer for a capital

[1] *See* State of Ohio v. Anthony Adrejic, Case No. 04-1868, attached as Exhibit 1.

> "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

This case also involves the 6th Amendment of the United States Constitution which states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense."

The constitutionality of a law or administrative order for the United States or Ohio is not being challenged.

INTRODUCTION

Recently, the Northwestern University School of Law completed a study of wrongful convictions called *The Snitch System*.[2] *The Snitch System* is not merely the testimony of an informant. It is actually a process which necessarily engages and requires covert use of police personnel to further conduct that is unequivocally criminal and, but for the fact that it is being done by police officers, would typically require commensurate criminal prosecutions. *The Snitch System* builds its case upon the testimony of a confidential informant, then condones and justifies means that are both fair and foul to preserve this testimony, including presentation of false evidence represented to be true and credible, resulting in deliberate deception reaching both the court and jury. *The Snitch System* ultimately engages a modus operandi for trial preparation and presentation which is inherently incompatible with rudimentary demands of justice.

Anthony Andrejic's case epitomizes and typifies the wrongful conviction resulting from *The Snitch System*. This is not just an Ohio problem. In discussions with authors of *The Snitch System*, we have learned that this is a national epidemic. Out of 111 death row exonerations since capital punishment returned in the 1970's, 45.9% of these convictions – nearly half – were secured through *The Snitch System*.[3] Our law firm is currently working upon two such

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[2] *The Snitch System* is a product of the highly regarded Bluhm Legal Clinic at the Northwestern University School of Law, Center on Wrongful Convictions. A copy of this report can be obtained online at; www.law.northwestern.edu/wrongfulconvictions.

[3] The next leading cause for wrongful convictions consisted of erroneous eyewitness testimony, accounting for 25.2% of cases, followed by false confessions in 14.4% of cases and misleading scientific evidence in 9.9% of cases. *The Snitch System* at p. 3.

cases where prosecutions were secured for essentially a life sentence due to *The Snitch System*.[4]

Superficially, this case follows in the line of *Mooney v. Holohan*, 294 U.S. 103 (1935), *Brady v. Maryland*, 373 U.S. 83 (1963) and, most recently, *Banks v. Dretke*, 540 U.S. 668 (2004). Many facets of this case have been discussed in these decisions at length, such as; (1) damage caused by an unprepared and ineffective counsel; (2) truth promoting precautions which must accompany the testimony of a jailhouse informant; (3) the insidious character of a prosecution which conceals highly exculpatory evidence; (4) the havoc wrecked when police officers commit perjury; and (5) the prejudicial impact of a prosecution's closing argument when untrue facts are represented as true to a jury during final argument. In *The Snitch System*, these elements are all present. Even more ominous, these tactics are coordinated and bundled into a regularly repeated modus operandi designed for achieving one singular purpose, namely to subvert and undermine truthful evidence contradicting the testimony of a confidential informant.

The question presented involves whether or not the 5th and 6th Amendment of the U.S. Constitution has been violated by practices which cumulatively amount to a manipulated prosecution for a phantom crime. Lead counsel Leonard Yelsky has been practicing law for nearly 47 years. While Mr. Yelsky has been exposed to prosecutorial misconduct on more occasions than he cares to recall, he has never seen this conduct regularly repeated and reduced to a standard operating procedure for prosecutorial trial practice. These improper prosecutorial tactics, similar to those set forth in study assembled by the Northwestern University School of Law – Center for Wrongful Convictions, are churning out wrongful convictions at an alarming pace and on a national

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[4] *See Beckett v. James Haviland*, Case No. 3:01CV7374, discussed *infra*.

scale. These prosecutorial tactics threaten the core of criminal trial practice throughout the country. For this reason, this case should be deemed suitable for review.

STATEMENT OF CASE

Defendant Anthony Andrejic was a resident physician at the Cleveland Clinic hospital when events culminating in two criminal convictions commenced.

On January 31, 2001, Andrejic was formally sentenced to 4 ½ years in prison for drug trafficking in Cuyahoga County Case No. 397990. This drug conviction was proper. Fourteen days later, while Andrejic was waiting in the county jail to be shipped to a state prison, he was indicted in Cuyahoga County Case No. 402317 for two counts of Conspiracy to Commit Aggravated Murder,[5] four counts of Attempted Aggravated Murder[6] and two counts of Retaliation.[7] This supposed criminal conduct occurred during a 14 day interval in which no one was murdered or threatened, and while Andrejic was locked up in county jail. For these homicide based crimes, Andrejic must serve 45 years.

Reliance upon Confidential Informants

In July of 2000, Police visited Andrejic's home in response to a complaint about drug activity. During a search

[5] This is a violation of Ohio R.C. 2903.01.
[6] This is a violation of Ohio R.C. 2923.02.
[7] This is a violation of Ohio R.C. 2931.05.

of the premises, a home made video was found. In this video, Andrejic says to his wife, "If I find out, I will kill you."[8] Andrejic's wife refused to cooperate as a state witness for the homicide based charge. Andrejic's wife was also a drug addict and aware of how drugs can influence behavior. She came to the conclusion that this conduct was influenced by drugs and that her husband would not hurt her.[9]

Andrejic acknowledged a serious drug addiction problem. He also told police that his wife received cocaine from a local drug trafficker named Mike Smith. Police promptly enrolled Andrejic into their confidential informant program.[10] While enrolled as a confidential police informant, Andrejic was personally undergoing drug treatment, where he met another drug addict named Todd Roland. In the course of these treatment sessions, Roland persuaded Andrejic to sell him a prescription for OxyContin.[11]

Shortly after receiving this prescription, Roland went to the police and reported Andrejic for selling an OxyContin prescription. The police promptly enlisted Roland into their confidential informant program. Roland successfully secured three prescriptions from Andrejic for $2,500. Immediately thereafter, Andrejic was arrested and ultimately convicted for unlawful drug trafficking. The State's case rested entirely upon prescriptions secured by Roland corroborated by marked bills used to buy these drugs. No charges were ever brought against Roland for his part in this crime or for his confessed role in purchasing OxyContin while in a drug treatment program.

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[8] *See* Journal Entry and Opinion, 1st Appellate Decision, Case #79700 attached at p. 9 - 10. [Hereafter referred to as *1st Appellate Decision*.]

[9] 1st Appellate Decision, at p. 6.

[10] 1st Appellate Decision, at p. 3.

[11] 1st Appellate Decision, at p. 3.

Reflecting the home made video bearing the statement, "If I find out, I will kill you," police indicted Andrejic for attempted murder. In a negotiated plea agreement, this charge was dropped. Police officers refused to let this charge go dormant. While Andrejic waited for his sentencing hearing on January 31, 2001, his jailors assigned a tested and proven jailhouse informant, Charles Corwin, to become his pod mate. Corwin moved into Andrejic's pod on January 23, 2001.[12]

Corwin is an incorrigible felon with a history of committing drug and property related crimes dating back to 1978.[13] In September of 2000, Corwin was back in the Cuyahoga County prison for multiple charges involving at least six different crimes grouped under three cases.[14] On January 9, 2001, all three cases against Corwin were settled through a plea agreement.[15] While awaiting his own sentencing on March 1, 2001, Corwin immediately ingratiated himself to his jailors by serving as a jailhouse confidential informant and providing valuable information to Detective Sopkovich on his cell mate, Cleofis Smith.[16] On January 23, 2001,

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[12] *See* Defendant's Transcript of Proceedings, Vol. 2 of VIII, Testimony of Charles Corwin on April 17, 2001, at p. 227 (hereafter *Corwin's Testimony*).

[13] *See* Ohio Department of Rehabilitation and Correction website, Offender Search Engine http://www.drc.state.oh.us/. Corwin has been convicted of 22 crimes. His institution number is A473859.

[14] *See* Corwin's Testimony, at p. 222. [Corwin was incarcerated for receiving stolen property, fleeing and eluding, theft and unauthorized use of a motor vehicle.]

[15] Corwin's Testimony, at p. 222 (acknowledging these cases were settled through a plea agreement) and p. 224 (establishment of the date for entering this plea of Jan. 9, 2001.)

[16] Corwin's Testimony, at p. 225-226 [Discussing how he implicated the step father of his prior cell mate, Cleofis Smith, in a murder and rape case, which made him persona non grata in the county's new prison. After this occurred, Corwin moved to the old prison.]

when Corwin moved into Andrejic's pod,[17] he was persona non gratis in the new Cuyahoga County prison because of his services as a confidential informant.[18] Andrejic was more than Corwin's pod mate. Andrejic was also Corwin's new assignment from Detective Sopkovich under its jail-house informant program.

Andrejic is not a street savvy thug or a person familiar with prison mentality. Corwin had been Andrejic's pod mate for 8 days prior to Andrejic's sentencing hearing on January 31, 2001. During this time, Corwin had ample opportunity to learn of Andrejic's case and worm his way into his pod-mate's confidence. Working with three police detectives, Corwin agreed to go into his pod wearing a wire "right after he (i.e. Andrejic) was sentenced."[19] At this extremely vulnerable and unstable moment, the primary evidence relied upon for these homicide based crimes was collected.

On January 23, 2001, when Corwin entered Andrejic's pod, he had a strong incentive to do the bidding of police officers. Fourteen days earlier, he had just pled guilty to numerous crimes and he was awaiting sentencing. If nature had taken its normal course – given Corwin's extensive criminal history – he should have received a lengthy prison sentence. This incentive was cleverly misrepresented to

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[17] In the Cuyahoga County old prison, there are only single cells and there are no cell mates. However, single cells are clustered into pods, which are central areas where people spend most of their time. Moving Corwin into Andrejic's pod was the functional equivalent to being a cell mate, because people in the same pod must necessarily get to know one another once they have left their individual cells.

[18] Corwin's Testimony, at p. 225 [asked about the circumstances causing him to be moved, Corwin answered "I was having trouble with some people down there.]; at p. 225-226 (discussing his role in implicating the step father of Cleofis Smith in a murder and rape case; and at p. 227 [establishing the date of his move at Jan. 23, 2001.]

[19] Corwin's Testimony, at p. 244. The three police officers were Greg Whitney, Lynn and Detective Sopkovich.

the jury. Simultaneously, this same tactic camouflaging his incentive to lie deflected a *Brady* claim.[20]

The State raised and deflected the issue as to whether an incentive to lie existed.

> Q. So, when you resolved your cases in Judge Lillian Green's room by way of plea bargain, what was your anticipation in cooperating with the Andrejic case."
>
> A. "There was no promises made, no preferential treatment, no promises made. Actually, they told me at my sentencing they would say what I did."[21]

On March 1, 2001, Corwin was *paid*. He received time served for his charge of unauthorized use of a motor vehicle[22] and community sanctions for charges related to receiving stolen property, fleeing and eluding and theft.[23] No prison time was required for any of these crimes. The record clearly reflects highly preferential treatment. On April 17, 2001, when Corwin made these representations to both the trial court and the jury, he was well aware of the kid glove treatment which he received in Judge Green's courtroom. In this manner, deliberate deception entered the record. Displaying his true colors, Corwin was back in prison on January 29, 2002.[24]

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[20] A *Brady* claim arises when the State deliberately withholds exculpatory evidence, such as evidence that a crucial prosecution witness had a strong incentive to lie or a witness was induced by a promise of valuable consideration.

[21] Corwin's Testimony, at pp.'s 245-246.

[22] *See* Cuyahoga Case No.'s CR-00-395457.

[23] *See* Cuyahoga Case No.'s CR-00-398258, and CR-00-394302.

[24] On December 19, 2001, Mr. Corwin violated his parole and a new warrant was issued for his arrest. By January 29, 2002, he was back in Cuyahoga County's prison.

Statements captured on tape by Corwin served as foundation for finding Andrejic guilty of two counts of conspiracy to commit murder, four counts of attempted aggravated murder and one count of retaliation, resulting in a prison sentence of 45 years. Corwin was never charged for his part in these felonies, which consisted of enlisting the so called assassin.

Prompting the Commission of Crimes

Andrejic was a law abiding citizen with a profession, prior to the commencement of his criminal convictions. He is genuinely guilty of writing unlawful prescriptions for drugs and nothing more.

At the drug treatment facility, it was Roland who concocted the first of two criminal schemes for which Andrejic alone has been convicted; namely a plan to make money by selling drug prescriptions. Seizing upon Andrejic's authority to write drug prescriptions, it was Roland's idea to acquire an unlawful prescription for OxyContin.[25] There is nothing in the record indicating whether Roland paid Andrejic for this prescription and, if so, how much was paid. The idea of selling prescriptions sprang from Roland, not Andrejic. To our knowledge, Roland has never been punished.

The idea of selling three drug prescriptions for OxyContin, Percocet and Vicodin ES for $2,500 sprang from police officers working with confidential informants.[26] Ironically, if Andrejic had already proven himself a good confidential informant by delivering Mike Smith to the prosecution, these officers would never have turned Roland loose upon Andrejic. Today, he would still be practicing medicine.

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[25] 1st Appellate Decision, at p. 3.

[26] 1st Appellate Decision, at p. 3.

A critical piece of evidence against Andrejic in the homicide based crimes for which he was indicted and convicted, consisted of a three way telephone conversation between Corwin, Corwin's mother and a purported assassin, police detective Gregory Whitney posing as Jeff Duvall. Corwin wore a wire one time on his assignment with Andrejic and, during this single instance, the three-way telephone call took place.[27] Corwin's mother was recruited to become part of the ruse, because detective Whitney was using his cell phone, and cell phones cannot accept collect calls.[28] The most critical piece of evidence consisted of a Power of Attorney executed by Andrejic in favor of Corwin's mother. The seed for this idea was also planted by police officers. Detective Whitney instructed Corwin to require "some money up front" while he was being fitted for a wire.[29] A Power of Attorney was the only vehicle known to Corwin for accomplishing the feat of advancing money to someone while being incarcerated.[30]

There is another anomaly embedded in these facts resting irrefutably within the province of government officials. Andrejic was sentenced on January 31, 2001, which happened to be a Wednesday. After an inmate is sentenced, they are allowed a maximum of three visitation days before they are transported to a prison reception center, where they are issued a state institution number and begin serving their sentence. Andrejic's family is located in New Jersey.[31] With no local family members, there was no reason to hold Andrejic for the maximum time of five days.

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[27] Corwin's Testimony, at p. 245 [noting one conversation with Detective Sopkovich] and pp.s 254-256.

[28] Corwin's Testimony, at p. 255-256. In addition, Corwin's mother was equipped with a recording device for taping the phone call.

[29] Corwin's Testimony, at p. 263-264.

[30] Corwin's Testimony, at p. 261-262.

[31] Corwin's Testimony, at p. 265.

Nevertheless, by February 6, 2001, Andrejic should have been on a bus heading for Lorain Correctional Institution where reception and processing takes place in the northern half of Ohio. There were no warrants outstanding against him. If Andrejic had been on this bus, the case against him would not have come together. It took until February 9, 2001 for the Power of Attorney form to be executed. Holding Andrejic for nine days after sentencing was a magic trick only government officials could perform.

Government agents concocted, prompted and executed the second criminal scheme for which Andrejic was convicted by doing the following; (1) wiring Corwin with a tape recorder at the critical moment – just after he had been sentenced – with full knowledge that he would be unstable and extremely vulnerable to suggestions for retaliation; (2) making a three way telephone call through their confidential informant's mother to another detective posing as an assassin while their informant was taped and just after sentencing; (3) planting the seed for a Power of Attorney by a demand from the detective posing as an assassin for "up front money"; and (4) extending his stay at the county prison an additional 4 days until a Power of Attorney form could be delivered by the confidential informant. Police officers were instrumental in choreographing every critical stage necessary for proving the elements of these homicide based crimes, including the violation of an ordinance mandating transport of convicted felons after three visitation days to secure additional time for adding an indispensable element of proof. In the 14 days that elapsed, none of the targets of this scheme were ever threatened or placed in harm's way.

Suppression of Highly Exculpatory Evidence

Andrejic obtained the form for a Power of Attorney on February 9, 2001, by sending a letter – actually an inter-office memo termed a *kite* inside prisons – to the law

library.[32] The form retrieved from the first kite (i.e. the Power of Attorney) authorized Corwin's mother to withdraw $150 from his bank account. This withdrawal was to serve as "up front money" for assassin Jeff Duvall, who was actually Detective Gregory Whiting.[33] Later the same day, on February 9, 2001,[34] Andrejic issued a second *kite*, this time to the Warden seeking help in rescinding the Power of Attorney and effectively undermining the work performed by Corwin and three police officers. More highly exculpatory evidence would be difficult to imagine. As a result of the second *kite*, Corrections Officer Dwight Lacey visited Andrejic in his cell. At this time, Andrejic exposed Corwin's and Jeff Duvall's murder plot.[35] In so doing, Andrejic believed he was saving these people from the make believe assassin Jeff Duvall while also serving as an informant to lessen his own sentence.

The devastating ineptitude of Andrejic's trial counsel – who had a copy of this second *kite* in his file and never attempted to enter it into evidence – certainly did not help matters.[36] Nevertheless, if the prosecution is aware of exculpatory evidence, there is a clear and commensurate duty on their part to disclose this material.[37] We know that Andrejic's kite reached the Warden's office, because corrections officer Dwight Lacey came to Andrejic's cell to discuss this Power of Attorney, and ended up learning of

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[32] This Power of Attorney was never notarized. Flaws in this Power of Attorney are discussed at length under the topic of representing false evidence as true.

[33] Corwin's Testimony, at p. 269.

[34] *See* Brief of Appellant, Case No. 84039, attached Exhibit 2, Andrejic's kite seeking to rescind his Power of Attorney.

[35] Brief of Appellant, Case No. 84039, at pps. 6, 8 and 15.

[36] Brief of Appellant, Case No. 84039, at pps. 6, 8.

[37] Banks v. Dretke, 540 U.S. 668, at 696 (2004) ["A rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process."]

the murder plot as well.[38] Corrections Officer Lacey reported back to his supervisor, the Warden, who in turn told him to call the police. Upon calling the police to report this plot, Corrections Officer Lacey was told not to worry about it. Police were aware of Andrejic's second kite and actively working to suppress it. The kite itself and a log book maintained at the Cuyahoga County prison corroborating Lacey's investigation were certainly in the prosecution's possession, but this evidence was never divulged.

Condoning Perjury by a Law Enforcement Officer

The State's case rested primarily upon the Power of Attorney signed by Andrejic, for this was the only hard evidence indicating any intent to pursue his verbal threats. At trial, Sheriff's Lieutenant Sopkovich was asked directly whether or not Andrejic has issued any letters (i.e. *kites*) pertaining to Corwin or to allegations that Corwin had made.[39] Lieutenant Sopkovich responded to three direct questions with the answer *no*, and all three responses were untrue and perjurious.

If Lieutenant Sopkovich had responded truthfully to these questions, Andrejic's second and highly exculpatory *kite* would have entered the record and the State's case would have rapidly unraveled. By refusing to acknowledge this evidence, Lieutenant Sopkovich was doing more than just committing perjury. This police officer was also actively concealing critical vindicating evidence from both the Court and jury.

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[38] Brief of Appellant, Case No. 84039, attached Exhibit 5, Affidavit of Dwight Lacey.

[39] Sheriff Lieutenant Sopkovich Testimony, at p. 604.

Patently False Evidence Represented as True by Prosecution

The Power of Attorney executed by Andrejic in favor of Corwin's mother was clearly the most incriminating piece of evidence entered into the record at trial.[40] On its face, this instrument is worthless. In Ohio, the grantor of a Power of Attorney must have their signature notarized. The place for a Notary's signature is blank, resulting in no independent evidence attesting to Andrejic's signature being genuine or constituting an act of free will.

If Corwin's mother had presented this instrument to Key Bank in an attempt to withdraw money from Andrejic's account, she would have been politely rebuffed at best, and possibly reported to police as a charlatan in her own right. Despite these fatal flaws, the Assistant County Prosecutor argued on the record that this Power of Attorney instrument was equivalent to money.[41]

Guilty knowledge of Andrejic's exculpatory second *kite* came out in a statement by Assistant County Prosecutor Mahoney during his final summation when he states, "There is not a shred or iota of evidence in front of you where you could go back to your room and say, "Well he was going to give it up ..."[42] This statement was only made possible because of three denials by Lieutenant Sopkovich, all of them under oath and all of them false. Absence of evidence becomes noteworthy, only when there is reason to believe the evidence does exist. Prosecutor Mahoney's statement heralding this absence of evidence is both highly suspect and revealing, because it betrays his actual knowledge of evidence contradicting the trial testimony of a crucial prosecution witness.

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[40] This Power of Attorney was the Prosecution's Exhibit No. 8.

[41] *See* Trial Transcript, at p. 1148. ["... then Andrejic signed over some money to pay for the murders."]

[42] *See* Trial Transcript, at p. 1047.

During final summation, the prosecutors went further than simply refusing to divulge Andrejic's second exculpatory *kite* and the investigation by Corrections Officer Dwight Lacey; they argued that such evidence did not exist. Of course, this was patently false and highly prejudicial.

If Andrejic's second *kite* had reached the jury, corroborated by testimony from Corrections Officer Lacey confirming his immediate intent to revoke the Power of Attorney instrument, this highly exculpatory evidence would enter the record on the mitigating side of the scale. Once this occurred, there is abundant reason to believe that at least one juror would have voted for acquittal. This highly exculpatory evidence was first suppressed; then secondly, its existence was perjuriously denied and, finally, absence of this evidence was falsely represented by the prosecution as emphatic and irrefutable proof in favor of Andrejic's conviction. Andrejic is doomed to serve 49 years, 45 of which are the result of his wrongful conviction which has been tacked on cumulatively to this first conviction. For Andrejic, this sentence is the functional equivalent to a life sentence without parole, due to a manipulated prosecution prompted by a phantom crime.

REASONS FOR GRANTING REVIEW

I. Andrejic's case would be an excellent vehicle for promulgating standards for raising the *actual innocence* or *miscarriage of justice* defense when the prosecution's case springs from *The Snitch System*. [43]

Wrongful convictions often occur when the government necessarily rests their case entirely or predominantly upon a confidential informant, and the accused is cursed with ineffective counsel. The critical second *kite* written by Andrejic was given to his trial attorney, and it remained in his attorney's file. Incredibly, this evidence was never entered into the record and Andrejic was never allowed to testify as to its purpose. On appeal, prosecutor's called this a trial strategy decision. Appellate courts bought this argument and routinely affirmed. Given the enormous and undeniable benefits which would have flowed from its introduction and the weight it would have added to the mitigating scale, this conclusion is clearly unreasonable.

Andrejic has served most of his 4½ years for writing four unlawful prescriptions. He is a victim of *The Snitch System*. It is respectfully submitted that Andrejic's case can satisfy both the actual innocence and the miscarriage of justice criteria, although both exceptions are admittedly narrow and tightly construed. When *The Snitch System* is employed, serious consideration needs to be given to these

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[43] To show factual innocence one must demonstrate by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have reached the verdict that resulted. Sawyer v. Whitley, 112 S. Ct. 2514, 2517 (1992). "The term ["miscarriage of justice"] is by no means to be deemed synonymous with procedural irregularity, or even with reversible error. To the contrary, it demands a much greater substance, approaching perhaps the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry." Valenzuela v. Newsome, 253 Ga. 793, 796 (325 S.E.2d 370) (1985),

seldom used defenses. The number of wrongful convictions is increasing at an alarming pace, and nearly half of these cases can be traced to *The Snitch System*. When the elements set forth in our question converge, there needs to be some roadmap for curbing these prosecutorial abuses and allowing a person such as Anthony Andrejic another chance. In our opinion, a new trial should be granted.

When criminal behavior at issue is entirely prompted by police informants, and a critical piece of evidence requires postponing the transport of Andrejic to the state reception center until it can be secured, something is definitely wrong with this picture. Andrejic is not even culpable of the charges for which he stands convicted. He was locked up in county prison hounded by an informant, who was at the time very anxious to please due to years of incarceration time pending on his own case. It is extremely disconcerting to see a medical surgeon receive a 45 year prison sentence, while an avowed career criminal walks out of Court under supervision. Justice was certainly not served.

II Prosecutorial Misconduct needs to be placed upon the same platform applicable to ineffective defense counsel; and stern corrective measures need to be adopted to curb prosecutorial misconduct and break the vicious cycle of employing the tactics reflected in this case.

This law firm has two active cases involving prosecutorial misconduct resulting in a wrongful conviction. The other case culminated in the granting of a writ of habeas corpus by a Federal Judge in the Northern District of Ohio.[44] In both cases, the testimony of a confidential informant was fundamental to the prosecutor's case. In both cases, police officers had to commit perjury to protect this testimony and

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[44] Beckett v. Haviland, Case No. 3:01CV7374, U.S. District Court for Northern District of Ohio, at Toledo.

maintain the credibility of their informant. In both cases, the informant was given a strong incentive to lie. In both cases, the prosecution was aware of improper evidence and court tactics, but no red flags were ever raised. In both cases, deliberate deception was allowed to reach the court and jury. In short, the checks and safeguards built into our trial practice were first disarmed and then abducted.

When all of these elements converge, there needs to be a way to place the prosecutor's tactics on trial. If a defense attorney misbehaves, the court has numerous tools available for correcting the current violation and curbing future abuse. The attorney can be removed the specific case. Future abuses can be arrested by removing the attorney from the list of approved court-appointed counsel. In appropriate cases, fines and contempt citations can be issued, and a complaint can be lodged with the state's disciplinary counsel. To our knowledge, none of these tactics are ever seriously considered when a prosecutor misbehaves. Even if sanctions against a prosecutor were effected, the defendant would still be in prison. There is really no good remedy for the defendant. We believe the best remedy is to prohibit the prosecutor from trying the defendant again, similar to the exclusion rule.

If a criminal defendant's attorney is unprepared and pathetically ignorant of his client's true conduct, the onus placed upon the prosecutor in the search for truth becomes greater, not less. As the Supreme Court stated:

> "the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to

> govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [45]

We urge this Court to endorse tools for curbing prosecutorial misconduct, when perjury by police officers is not flagged, when patently false evidence is represented as true, and when highly exculpatory evidence is not divulged in a timely manner so that it can be properly considered by a jury. Further, if the conclusion of an evidentiary hearing results in a finding that the prosecutor's tactics were indeed subversive to the search for truth, a victim of this abuse ought to be entitled to a new trial and any other relief deemed appropriate under the circumstances.

III Andrejic's attorney rendered ineffective assistance of counsel.

The Sixth Amendment requires a confrontation between adversaries.[46] Under the facts of this case, Andrejic was virtually an unarmed prisoner matched against gladiators. His attorney's failure to enter the second *kite* into evidence was devastatingly prejudicial. The failure to call a corrections officer as a defense witness, with first hand knowledge of this second *kite,* was almost equally prejudicial. If this kite had been entered into evidence after being corroborated by a Corrections Officer, there is no doubt whatsoever that the jury would have come to a different conclusion. Under the standard set forth in *Strickler*, Andrejic has not received effective representation. These flaws are prejudicial, the evidence is highly exculpatory and it would have definitely changed this verdict.

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[45] See Strickler v. Green, 527 U.S. 262, at 281 (1999) [hereafter *Strickler.*] See: *Strickland v. Washington*, 466 U.S. 668 (1984) generally.

[46] U.S. v. Cronic, 466 U.S. 648, 656 (1984).

We also find a high coincidence of this kind of attorney representation when *The Snitch System* has been employed. Over the years, the prosecution has adopted a number of clever tactics for compromising even a competent attorney. In *Strickler*, [47] the petitioner was told that "the prosecutor's files were open to the petitioner's counsel" and "there was no need for a formal Brady motion." In Banks v. Dretke, [48] the defense attorney was told, "We will, without the necessity of motion, provide you with all discovery to which you are entitled." Of course, highly exculpatory evidence was concealed in *Banks*. This Court has held that a defense attorney is justified in relying upon these assurances. [49]

In Andrejic's case, the possibility of compensation for Corwin did not come out until the trial, leaving Andrejic's counsel with no time to prepare counter measures such as discovering Corwin's long criminal history, thereby rendering his testimony of "no promises" implausible. For Andrejic, ineffective assistance of counsel was due to being unprepared. However, even a diligent defense attorney can be undermined if the Brady maneuvers utilized in *Strickler*, *Banks* and in this case prevent them from mounting an effective defense.

These prosecutorial ploys are all too often compromising the entire defense. Again, it is not a coincidence that these tactics surface when *The Snitch System* is in full bloom. Ineffective assistance of counsel constitutes another integral element to wrongful convictions, and this lends further support for the ordering of a new trial.

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[47] *Strickler*, 527 U.S. 262, at 276 n. 14 (1999)

[48] 540 U.S. 668, 675 (2004).

[49] *Banks*, 668 U.S. at 696. [Courts, litigants and juries properly anticipate that obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney will be faithfully observed.]

CONCLUSION

For the reasons heretofore presented, we urge the Court to exercise its power to grant certiorari and review this case.

Respectfully submitted

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[Cite as *State v. Andrejic*, 2002-Ohio-1649.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 79700

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	and
ANTHONY ANDREJIC,	:	OPINION
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	APRIL 11, 2002
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Common Pleas Court
	:	Case No. CR-402317
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	_____

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MICHAEL J. CORRIGAN, J. :

A jury found the defendant Anthony Andrejic guilty of two counts of conspiracy to commit murder, four counts of attempted aggravated murder and one count of retaliation. In this appeal, he contends that the court erred by admitting other acts evidence and that the state failed to present sufficient evidence on all of the counts to permit them to go to the jury for consideration.

In order to give a complete statement of the facts, we must delve into two separate, but related crimes committed by the defendant. In July 2000, the police obtained information about drug activity occurring at a house owned by the defendant and his wife. At the time, the defendant was a medical doctor, working as a resident in an area hospital. The police went to the defendant's place of employment and interviewed him. They learned that the defendant had a serious drug addiction. He had recently been in an automobile accident while under the influence of drugs, and had also nodded off while performing surgery on a patient. His employer discovered his drug use and demanded that he seek drug treatment or face termination. During an interview with the police, the defendant admitted his drug use and said that his wife had been using crack cocaine. The defendant went on to say that in exchange for sexual favors, he would sometimes write prescriptions for narcotics. He said that his wife had been involved with a man named "Mike" who supplied his wife with cocaine. This last piece of information prompted the police to sign the defendant up for their confidential informant program.

The defendant continued to go to drug treatment even as the police were hoping to use him as an informant. While in drug treatment, the defendant met Todd Roland. Roland soon convinced the defendant that he could make money selling prescriptions for narcotics. The defendant agreed and sold Roland a prescription for the drug OxyContin.

When Roland left drug treatment, he went to the police and told them that the defendant was selling prescriptions. The police decided to use Roland as a confidential informant against the defendant. They had Roland arrange to pay the defendant $2,500 for four prescriptions. The drug buy went forward at the defendant's office and he wrote three prescriptions for OxyContin, Percocet and Vicodin ES. The defendant consented to a search of his office and the police found a briefcase containing the cash used in the drug deal.

In questioning following the defendant's arrest, the police confronted the defendant with allegations that he had been planning to kill his wife. During his time in drug treatment with the defendant, Roland learned that the defendant had expressed a desire to kill his wife. The defendant told the police that his wife was involved with a man named "Mike" (Mike Smith, one of the victims) who had been selling her drugs and forcing her to prostitute herself for him. The defendant hoped to inject his wife with either heroin or potassium chloride, a drug that would make it appear as if his wife had a heart attack. Because the defendant would be in drug treatment at the time, he believed he would have a solid alibi. He tried to tell the police that he did not really want his wife killed, but also said that when discussing his wife's murder with Roland, he "was hot enough."

When searching the defendant's house after his arrest, the police found a home-made video tape of the defendant and his wife that showed the defendant telling his wife that he would kill her.

The defendant was charged with drug trafficking, pleaded guilty to the charges and received four and one-half years imprisonment. He was transferred to the county jail to await transportation to prison.

While waiting in jail, the defendant became friendly with a fellow inmate named Charles Corwin. In discussions with Corwin, the defendant said that he wanted to kill Mike Smith and Todd Roland for their roles in his drug use and conviction for drug trafficking. Corwin told the defendant that he knew some people that could do the job, and the defendant told Corwin that he would give him an automobile if Corwin could arrange the deaths. When asked about the possibility that his wife might be killed in an attempt on Smith's life, the defendant said that she would be considered "collateral damage." The defendant's wife was pregnant at the time, and he suspected that Smith was the father.

Corwin then went to the police and told them about his discussions with the defendant. The police put a wire on Corwin and he engaged the defendant in an extended discussion of, among other things, the murder plot. To extend the ruse, a police officer acted as the assassin. Using Corwin's mother to arrange a three-way call, the defendant spoke to the police officer/purported assassin from the county jail.

In further discussions, the defendant told Corwin that he wanted Roland dead for the part he played in the sting operation that led to the arrest for trafficking. Smith's involvement with the defendant's wife, both as a suspected drug dealer and paramour, explained the defendant's desire to have him killed. The defendant agreed to pay $30,000 for the job. As a show of good faith, he signed over his power of attorney to Corwin's mother so that she could withdraw $150 that he had in a bank account for a down payment. All of these conversations provided the basis for the indictments in this case.

The defendant testified on his own behalf and denied wanting to kill anyone. He admitted that he had conversations with Corwin, but said that he hoped to get the goods

on Corwin — that way he could go to the police and possibly receive a sentence reduction. He explained that he gave Corwin's mother the power of attorney so that she could transfer money into his commissary account at the county jail.

The defendant's wife also testified for the defense and said that she did not believe that the defendant intended to kill her as shown on the video tape. While she admitted that at one time she did believe that the defendant might kill her, she later came to the conclusion that he would not hurt her. She said that both she and the defendant were heavy drug users at the time, and all their actions were influenced by drugs. The wife did not deny that she and the defendant had marital problems at the time, and further admitted that both of them had extra-marital relationships.

I

The defendant's first assignment of error is that the court erred by admitting into evidence portions of the video tape found in the defendant's house that showed him threatening to kill her. The defendant argues the video tape shown to the jury referenced sex acts he performed on his wife that were inadmissible as other acts evidence that severely prejudiced him. The court admitted parts of the video tape and questions about some of the acts contained on the video tape over the defendant's vigorous objection.

Evid.R. 404(B) prohibits the admission of other acts evidence to prove the character of a person in order to show that the person acted in conformity with the evidence. However, the rule permits the admission of other acts evidence as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." *State v. Lowe* (1994), 69 Ohio St.3d 527, 530. Evidence should not be admitted as an exception to Evid.R. 404(B) unless the

matter concerned is genuinely a material issue. *State v. Smith* (1992), 84 Ohio App.3d 647.

As with any other type of evidence, admission of other acts testimony must not only meet the prerequisites of Evid.R. 404(B), but it must also pass muster under Evid. R. 403(A) which requires the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice***." The admission or exclusion of evidence lies in the trial court's sound discretion, State v. Sage (1987), 31 Ohio St.3d 173, and this applies to admission of other acts evidence as well. *State v. Bey* (1999), 85 Ohio St.3d 487, 489-490.

The video tape found in the search of the defendant's house shows him engaging in sexual conduct with his wife while she is in a drug-induced stupor. The tape is of poor quality, and the detective said that engineers at the National Aeronautics and Space Administration enhanced it. The vocal track is difficult to hear.

The tape was highly inflammatory and all the parties knew this — it was the subject of a great deal of discussion among the court and the parties. This was for good reason, as the sexual acts depicted on the tape were truly pornographic in nature, and the wife's consent to much of what occurred on the tape was questionable given her lack of coherency and/or consciousness throughout most of it.

Despite the inflammatory nature of the tape, the tape was mentioned by defense counsel in a question put to the defendant during his direct testimony. The defendant claimed that he had no recollection of the video tape and, in fact, had never viewed the video tape. When asked whether he and his wife were shown arguing on the video tape, the defendant said, "I don't recall we were in an argument. We were just talking. We weren't getting loud or anything like that, as far as I recall." The defendant went on to say that

he had "no recollection of what I said at the end of that, and I have not seen that video since I taped it***." He denied making a real threat to kill his wife, claiming he was letting the wife know that he was "pissed off." The defendant went on to profess his love for the wife, claiming that they were going to renew their marriage vows and that she had been seeing him regularly in jail, despite his counsel's advice that he should not talk to her.

On cross-examination, the state asked the defendant to recall his testimony about not being able to recall what was on the tape, yet being able to deny that he and his wife were shown arguing on the tape. The defendant recalled that "I said I didn't remember me having any argument with my wife." The court played a portion of the video tape showing a conversation occurring after the wife became coherent. We do not know exactly what the jury saw, as the transcript merely indicates in a number of places that "a portion of the video tape was played to the Court and jury." Answers to some questions about the video tape suggest to us that the jury saw the end of the video tape in which the nude defendant is shown lying on top of the wife and saying in a low voice, "If I find out, I'll kill you. If I find out, I'll kill you." As the tape continues, the defendant says, "If he finds out, I'll kill you." The defendant said this was a reference to his wife's father, although he could not recall why he made this reference. As the tape continues, the wife regains her coherency and becomes clearly distraught that the defendant shaved her pubic region and had anal sex with her while she was incoherent. The tape closes with her saying that she has been raped.

In questioning of a police detective called as a rebuttal witness, the state inquired about the video tape and allegations the wife made to the police after learning about the defendant's plot to kill her. The detective said that the wife watched the video tape in his presence and, after seeing what transpired while she had been incoherent, comment-

ed that she had been raped by the defendant. She insisted that the defendant be prosecuted for rape and swore out a complaint against him. The detective said that the state did not charge the defendant with rape.

The defendant maintains any references to the sexual acts depicted on the video tape are wholly irrelevant to the charged counts of conspiracy to commit aggravated murder. He maintains he made the video tape long before any allegations arose that he intended to kill the wife, and that there could have been no connection to the charged offenses of conspiracy to commit aggravated murder.

We agree with the defendant that the state could not use the video tape as other acts evidence under Evid.R. 404(B). The events depicted on the tape were too remote in time to be relevant to the charge of conspiracy to commit murder.

There was likewise no showing of motive contained in the video tape. Assuming that the video tape accurately depicted the defendant's desire to kill the wife, that desire had waned by the time he conspired to hire someone to kill the informant and pusher. This conclusion follows from the defendant's own recorded conversations in which he did not specify the wife as a target for hired killers. It is true that he acknowledged that in the event Smith were killed and the wife happened to be with him at the time, she might die as well — "collateral damage" — as the defendant put it. But she was not a primary target at the time he conspired with Corwin. Hence, there is no connection between the statements contained on the video tape and the conspiracy to commit murder. The video tape could not have been used as other acts evidence under Evid.R. 404(B).

The state argues that it did not use the tape as character evidence, but rather to impeach the defendant's credibility after he claimed that he and his wife had not been

arguing on the video tape and that they had a good marriage. The defendant testified:

> I love my wife. I've always loved my wife. We were going to renew our vows this year. I mentioned in the taped testimony here that, you know, she's the mother of my child, and I love her. I hoped she would get herself, you know, clean again in rehab, and fix herself up. It's no way to live, what was happening to her.

In response to a question about the current state of their relationship and whether he and his wife had made plans for the future, the defendant said:

> Yes, we carry on as husband and wife. I mean, nothing really changes, other than she's become sober, and she's come to see me. She seems to have gotten her life together, found I was still here at County Jail, and she came down to see me.

Evid.R. 607(A) permits the impeachment of any witness, subject to certain exceptions not applicable here, but the state's argument that it used the video tape to impeach the defendant about the state of his marriage is dubious at best. Perhaps the defendant did put the soundness of his relationship with his wife into play, but he did so by talking about his current relationship, as of the date of his testimony, not in the past. This was clear as he talked about his wife visiting him in jail and the plans they were making for the future.

At the time he made the video tape, the defendant did not have a good relationship with his wife. The defendant made no effort to hide that fact — the evidence showed that both the defendant and his wife had destructive relationships outside the marriage, and that their drug addictions led them to conduct their lives in a manner far different than they would have while sober. No portion of the

cited testimony (as offered by the state) suggests that the defendant meant to say that he and his wife had a "marriage that was filled with love, kindness and hope." See Appellee's Brief at 11. The defendant did not claim that at the time of his first drug offense and the time of making the video tape, that he and the wife had a perfect relationship. Far from it, they had significant problems. So there would have been no basis for finding that the defendant put his credibility at issue on this point.

The video tape is highly inflammatory, and the court knew this. It thought that playing only portions of the video tape would cure any claim of prejudice, but it clearly did not accomplish this goal. Although the jury did not see any of the sexual conduct shown on the video tape, the wife's comments following her return to coherency can leave no doubt as to what just transpired. The wife is shown discovering that the defendant had performed anal sex on her and shaved her pubic area. She claims that he raped her. It bears mentioning that the defendant is nude and his wife, although clothed, is in a state of disarray following the sex acts.

The court wrongly thought that it could minimize the prejudice to the defendant by showing only portions of the video tape. Our review of the video tape convinces us that no reasonable juror could have been able to differentiate the issue of credibility as now argued by the state from the allegations of sexual abuse made by the wife. The video tape should not have been played to the jury. It is the function of the state to vigorously prosecute its case, but at the same time to protect the rights of the accused and ensure a fair trial. The use of the video tape is more perplexing because the state did not need it to prove the allegations contained in the indictments.

The remaining question concerns the prejudice from the video tape. No error is reversible unless it can be shown

that the error contributed to the verdict. State v. Fears (1999), 86 Ohio St.3d 329, 339. Although we are troubled by the playing of the video tape, we cannot say that this error contributed to the guilty verdict. The evidence of the defendant's conspiracy to commit murder was overwhelming, and will be discussed in greater detail in assignments of error that follow. The short answer is that the state presented tape recorded conversations documenting the conspiracy and evidence that the defendant had taken affirmative steps to secure money for a down payment on the killings. On this record, we cannot find that the error was so prejudicial that it mandates reversal. The first assignment of error is overruled.

II

The second and third assignments of error collectively raise issues concerning the sufficiency of the evidence and argue that the court erred by denying the defendant's motion for judgment of acquittal on the counts of attempted aggravated murder and retaliation.

A

The court shall not grant a Crim.R. 29(A) motion for judgment of acquittal if the evidence is such that after construing the evidence in a light most favorable to the state, reasonable minds could reach different conclusions as to whether each element of a charged offense has been proven beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. This is, in essence, a claim that there was insufficient evidence to establish the elements of the offense. We must look at the evidence in the light most favorable to the prosecution and decide whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

B

R.C. 2923.01 defines the crime of conspiracy as follows:

> (A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, *** shall do either of the following:
>
> (1) With another person or persons, plan or aid in planning the commission of any such offense;
>
> (2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.
>
> (B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of such character as to manifest a purpose on the part of the actor that the object of the conspiracy should be completed.***

"***[T]he phrase 'overt act' means an open act, done outwardly, without attempt at concealment, and performed pursuant to and manifesting a specific intent or design." State v. Papp (1980), 68 Ohio App.2d 21, paragraph one of the syllabus.

The state presented compelling evidence of the defendant's conspiracy to commit murder. Corwin's testimony and tape recordings of his conversations with the defendant could leave no doubt that the defendant intended to kill his wife, Smith and Roland. The defendant is heard making

elaborate plans for the murders, including the method of murder and how he would pay for it. The defendant had an obvious motive to kill both Smith and Roland, as they were intimately involved with his prior conviction for drug trafficking. The wife was included in this conspiracy by virtue of her relationship with Smith. Although the wife was not specifically targeted as were Smith and Roland, the defendant clearly understood that his wife might be with Smith at the time and he considered her possible death as "collateral damage." Given the past history of drug trafficking and his annoyance with his wife for becoming involved with a man he believed to be supplying drugs to her, the basis for the conspiracy takes complete form.

The evidence of a substantial step was also compelling. The defendant spoke with an undercover police detective whom he thought was the hitman and made arrangements for the murders. The defendant also gave Corwin's mother his power of attorney so that she could withdraw funds as a partial down payment on the job. He agreed on a price and made payment arrangements, noting that he would be making a great deal of money once released from prison. All of these acts were substantial steps toward the completion of the conspiracy. See *State v. Ayers* (Mar. 16, 2001), Erie App. No. E-99-06, unreported.

The defendant makes light of the state's characterization of the withdrawal of $150 as a down payment for a hitman, saying it would be "ridiculous" to believe that this small amount could have been intended to pay for three murders. It may have been ridiculous to think that $150 could make a down payment on three murders, but so many other aspects of the defendant's criminal past showed his naivete in matters of crime that it becomes more and more plausible to think that he actually believed that this small amount would be enough. In any event, the defendant had discussed paying as much as $30,000 for the murders and went on to make arrangements to pay Corwin for his ser-

vices in procuring a killer. Reasonable minds could have viewed the defendant's attempt to get cash as a down payment as being a substantial step in furthering the conspiracy.

The state also presented sufficient evidence to show that the defendant knew his wife was pregnant at the time he conspired to murder her. The wife admitted that she was pregnant, albeit not by Mike Smith, at the time the conspiracy began to take form. Regardless who was the father of the child, the fact remains that the defendant did know that she was pregnant and knew that her death would certainly cause the wife's pregnancy to terminate as well.

Because a reasonable trier of fact could have found the essential elements of the conspiracy proven beyond a reasonable doubt, the court did not err by denying the defendant's motion for judgment of acquittal on all conspiracy counts.

B

The count of retaliation related to Roland as a result of his participation in the defendant's drug trafficking conviction.

A charge of retaliation requires the state to prove that the accused, purposely and by force or by unlawful threat of harm, retaliated against a witness who was involved in a civil or criminal act. See R.C. 2921.05(A). When a threat against a witness forms the basis of a charge under R.C. 2921.05(A), that threat can be communicated either directly to the victim or communicated to a third person so that the third person could be reasonably expected to convey the threat to the victim. State v. Lambert (June 5, 1998), Montgomery App. No. 16667, unreported.

Roland did not testify at trial, and there is no evidence that the defendant made an actual threat to him; there-

fore, the conviction for retaliating against Roland must be premised on the theory that the police communicated the threat to Roland. The police detective testified that Roland was "advised of the initial threat" presented in light of Corwin's taped conversations. This was sufficient evidence to show that the threat had been communicated to Roland. The court did not err by denying a motion for judgment of acquittal on this count.

III

The fourth assignment of error complains that the convictions for attempted aggravated murder and retaliation were against the manifest weight of the evidence. The defendant maintains that a focused jury would not have considered his threats to be a serious attempt to forge a conspiracy.

A claim that a jury verdict is against the manifest weight of the evidence is nothing more than a claim that the jury lost its way — that no reasonable person could have reached the same decision. *State v. Thompkins* (1997), 78 Ohio St.3d 380. This is an extremely difficult standard to meet because we recognize that the jury is in a better position to view the evidence and weigh the credibility of the witnesses. State v. DeHass (1967), 10 Ohio St.2d 230. If the jury's verdict is supported by sufficient competent and credible evidence going to each essential element of the crime charged, this court may not reverse. *Id.*

The defense's theory in this case was that the defendant had been trying to do the same as Corwin — document potential wrongdoing and go to the authorities with the hope that his assistance would yield a reduction in sentence. The defendant claimed that his conspiracy was so half-baked that no reasonable person would have thought he was serious in carrying out theconspiracy. As proof of this, he claimed that he immediately knew that Corwin's

alleged assassin was actually the police detective whom he had spoken with when arrested for drug trafficking. The taped recordings indicate that he suspected the alleged assassin was the detective, and he claims that it would make no sense for him to make this observation yet to continue to press on with his plan.

We cannot accept the defendant's explanation that his jailhouse conspiracy was a canard when the state was able to prove by the defendant's own admission that he signed a statement in which he discussed his plans to kill his wife by giving her a lethal injection that would look like a drug overdose. And his animosity against Smith, the alleged drug dealer, was admitted by him and perhaps even understandable. A motive against Roland was obvious. So the defendant had all kinds of motive to commit murder and he took the time to think out and discuss possible means of killing his victims. It will not do to say that the conspiracy was so poorly thought out that the defendant could not have seriously meant to carry out. "The state has no duty to distinguish between intelligent criminal plans and imprudent criminal plans as part of proving intent to commit a criminal act." *State v. Wills* (1997), 120 Ohio App.3d 320, 331. The jury could certainly reject the defendant's explanations and find he acted with knowing purpose to murder.

Nothing in the evidence convinces us that the jury lost its way in finding the defendant guilty of the attempted aggravated murder and retaliation charges. The verdicts were not against the manifest weight of the evidence.

IV

For his final argument, the defendant argues that the court erred by giving him the maximum sentence because he had *"almost no criminal history"* and no harm came to anyone involved in the case. He maintains that he poses no

harm to anyone and that his past actions were merely "irrational, harmless talk." See Appellant's Brief at 22.

The overriding purposes of the felony sentencing statutes are to protect the public from future crime by the offender and to punish the offender. See R.C. 2929.11(A). A sentence imposed for a felony should be calculated to achieve these two purposes, and be commensurate with the offender's conduct without demeaning the seriousness of that conduct or the impact that conduct had on the victims. See R.C. 2929.11(B). Moreover, the sentence should be consistent with sentences imposed for similar crimes committed by similar offenders. *Id.* The court has broad discretion when considering these sentencing factors. State v. Yontz (1986), 33 Ohio App.3d 342, and we cannot modify or vacate a sentence on appeal unless we find by clear and convincing evidence that the sentence is not supported by the record or is contrary to law. See R.C. 2953.08(G)(1).

If the court wishes to impose the maximum sentence on an offender, it must first make a finding that the offender committed the worst form of the offense or that offender poses the greatest likelihood of committing future crimes. See R.C. 2929.14(C). Second, the sentencing court must state reasons that support its findings. See R.C. 2929.14(B)(2)(d); *State v. Parker* (2001), 144 Ohio App.3d 344, 336.

The court fully complied with the applicable sentencing statutes, so we find no error with the court's decision to impose the maximum sentence. The defendant was not a first-time offender, as he had a prior conviction for drug trafficking. So he was not entitled to a presumption for the shortest term possible.

The court went on to find that the defendant committed the worst form of the offense and that he posed a great risk of committing future crime. The court noted that the de-

fendant planned a murder by car bomb, and in the process joked that the victims would likely need a parachute as the force of the explosion would throw them a great distance from the blast. The court also cited to the heartless nature of the planned murders and the defendant's relentlessness in pursuing his goal — making plans while incarcerated for another offense — as indicating a great likelihood that he would reoffend in the future. These reasons supported the statutory factors.

We need not focus any further on the statutory factors, as the defendant does not contest any of the court's reasons. Instead, he suggests that his conduct was the result of drug use, and that in any event, none of the victims suffered any harm because the police broke up the conspiracy before it reached fruition.

It may be that the defendant's drug use prompted the events that caused his life to spiral out of control, but we see no connection between his drug use and the jailhouse conspiracy to commit murder. Presumably, the defendant was not under the influence of drugs while being held in jail and conspiring to kill. He at least represented as much during his guilty plea for drug trafficking. So his past drug use cannot explain away his desire to commit murder while being held in the county jail. That conspiracy stemmed from a sober mind.

We likewise reject an argument that suggests that an attempt to commit a crime that does not cause injury to the victim cannot be considered the worst form of the offense. By its very nature, an attempt to commit an offense means that the offender did not accomplish the intended goal. But that does not mean that no harm was done to the victim. We have found that attempts to commit rape, for example, can constitute the worst form of the offense. See State v. Corrigan (May 25, 2000), Cuyahoga App. No. 76124, unreported. In this case, the court considered that the harm to

victims was palpable, and Roland submitted a statement to the court on how the murder conspiracy affected him and his family. And while the defendant's wife testified for the defense, it was clear at the time the police first learned of the conspiracy that she believed her life was in danger. We can understand that a victim of a conspiracy for murder by hire would live in constant fear and suspicion. Under these circumstances, the court did not abuse its discretion by finding this to be the worst form of the offense.

The assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed. The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL J. CORRIGAN
JUDGE

TIMOTHY E. McMONAGLE, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R.22(E) unless a motion for reconsideration with supporting brief, per App. R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the

Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

[Cite as *State v. Andrejic*, 2004-Ohio-6571.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NO. 84093

STATE OF OHIO,	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
vs.	:	and
ANTHONY ANDREJIC,	:	OPINION
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION	:	SEPTEMBER 30, 2004
CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Cuyahoga County Court
	:	of Common Pleas
	:	Case No. CR-402317
JUDGMENT	:	AFFIRMED.
DATE OF JOURNALIZATION	:	_____

APPEARANCES:

For plaintiff-appellee:

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Prosecutor
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KENNETH A. ROCCO, J. :

Defendant-appellant Anthony Andrejic, previously convicted and sentenced on four counts of attempted aggravated murder and one count of retaliation, now appeals the trial court's denial of his motion for a new trial.

Appellant claims he presented "newly discovered" evidence in compliance with Crim.R. 33 that demonstrated both that his counsel's performance seriously was deficient and that the prosecutor committed misconduct by suborning perjury.

Following a review of the record, however, this court finds no error in the trial court's decision. It, therefore, is affirmed.

The facts surrounding appellant's convictions already have been set forth in *State v. Andrejic,* Cuyahoga App. No. 79700, 2002-Ohio-1649 (*"Andrejic I"*). In pertinent part, they briefly are restated as follows:

In July 2000, appellant, a medical doctor working in a local hospital, was ordered by his employer to undergo treatment for a serious drug addiction. During treatment, appellant met another user named Todd Roland. Appellant confided to Roland that he wished to kill his wife for becoming involved and then intimate with a drug supplier named Mike Smith.

Appellant further agreed to sell Roland prescriptions for OxyContin, Percocet and Vicodin ES. Roland subsequently became a confidential informant on appellant for the police. As a result, appellant was ultimately arrested, and thereafter, convicted, on charges of drug trafficking.

While that case was pending, appellant made statements to the police that acknowledged he had conversation with Roland about his plans to murder his wife. Appellant asserted he had not been serious, but the police discovered a videotape in appellant's house that contradicted this

assertion. It had been filmed during a marital sexual encounter; appellant could be heard saying to his wife several times, "If I find out, I'll kill you."

Following his conviction in the drug case, appellant returned to the county jail to await transport to prison. He became friendly during that time with another inmate named Charles Corwin. Appellant confided to Corwin he wanted to kill two people for their roles in his current circumstances, viz., Roland and Smith. Appellant further indicated to Corwin that if his pregnant wife might be killed in the attempt on Smith's life, he would consider that "collateral damage." Corwin indicated to appellant he "knew some people who could do the job."

Instead, however, Corwin took this information to the police. The police placed a "wire" on Corwin and returned him to jail for further conversation with appellant. Eventually, Corwin arranged a three-way telephone call between his mother, appellant, and an officer posing as an assassin-for-hire. Appellant agreed to pay $30,000 for "the job." As a show of good faith, he told Corwin's mother he would send her a "power of attorney" in order that she could withdraw from his banking account a "down payment" of $150.

Appellant subsequently was indicted in this case based upon his conversations with Corwin. On April 26, 2001, after a jury trial, appellant was convicted of two counts of conspiracy to commit murder, four counts of attempted aggravated murder, and one count of retaliation. The trial court vacated appellant's convictions for conspiracy before sentencing him to a total term of incarceration of forty-five years.

Appellant appealed his convictions and sentences to this court in *Andrejic I.* Still represented by the attorney he had retained as trial counsel, he asserted as error the

trial court's admission into evidence of portions of the home video that showed appellant and his wife during a sexual encounter. He additionally claimed his convictions were supported by neither sufficient evidence nor the weight of the evidence. Finally, he challenged his sentence. In an opinion dated April 11, 2002, however, this court overruled appellant's assignments of error; his convictions and sentences were affirmed.

On August 5, 2003 appellant contemporaneously filed in the trial court two documents. The first was an "application" to file a delayed motion for a new trial based upon "newly discovered evidence." Appellant attached his affidavit. In pertinent part, he stated that he had not been made "aware of any post conviction rights until April 8, 2003," when he "met [his] present defense counsel." Appellant further stated it had taken new counsel until July 10, 2003 to discover "the serious irregularities that took place at***trial."

The second document was his motion for a new trial based on "newly discovered evidence." He listed this evidence as: 1) the misconduct of a state's witness; 2) the inadequacy of trial counsel; and, 3) the misconduct of the prosecutor. Appellant attached to his motion the identical affidavit; he also attached several other "exhibits." Among these were copies of a piece of evidence used at his trial and affidavits of persons who claimed to have witnessed "exculpatory" incidents either before or during appellant's trial who nevertheless had not been called by the defense.

On October 2, 2003 the trial court issued an order that denied both appellant's "application" and his motion. This court subsequently allowed appellant to file a delayed appeal of that order.

Appellant presents the following two assignments of error:

"I. It is reversible error for a trial court to overrule a motion for a new trial based on newly discovered evidence when the appellant did not know or understand his legal rights and his trial attorney and his appellate attorney never informed appellant that: he had a right to have a prepared attorney; his trial attorney had the duty to bring to the court and jury's attention highly exculpatory evidence; his trial attorney had the duty to expose perjury committed by a state's witness; and, that appellant had the right to have a prosecutor that (sic) would not use perjured testimony, would not argue to the jury that perjured testimony was true, and would not suppress highly exculpatory evidence.

"II. It is reversible error for the prosecution to introduce perjured testimony; argue to the jury that known perjured testimony is true; and, to suppress highly exculpatory evidence."

Distilled to its essence, appellant's argument is that he met all the requirements for a successful motion for a new trial pursuant to Crim.R. 33; therefore, the trial court lacked a basis upon which to deny his motion. This court disagrees.

Crim.R. 33 states in relevant part:

RULE 33. New trial.

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

* * *

(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial

is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given ***.

(B) Motion for new trial; form, time. Application for a new trial shall be made by motion ***.

* *

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered***. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

* *

(E) Invalid grounds for new trial. No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

* *

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

* *

> (5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.
>
> (Emphasis added.)

It must first be noted appellant in this case did not follow the proper procedure: he did not first obtain leave from the trial court before submitting his motion for a new trial. The rule clearly anticipates " a two-step process." *State v. Gray,* Cuyahoga App. No. 82841, 2003-Ohio-6643.

The trial court in this case never issued an order finding appellant was "unavoidably prevented from discovering the evidence" within the one-hundred-twenty-day period. Since the jury's verdict of guilt was rendered on April 26, 2001 and appellant's motion was filed more than two years later, appellant's motion was untimely pursuant to Crim. R. 33(B). As such, it was properly overruled on this basis alone. *Fairview Park v. Ricotta* (Sept. 21, 1995), Cuyahoga App. No. 66850.

Moreover, under Crim.R. 33, motions for a new trial are not to be granted lightly. *Toledo v. Stuart* (1983), 11 Ohio App.3d 292. Thus, it is well settled that the denial of a motion for a new trial on the grounds of newly discovered evidence is within the sound discretion of the trial court and may be reversed only where there has been a "gross abuse" of that discretion. *State v. Williams* (1975), 43 Ohio St.2d 88, paragraph two of the syllabus; *Toledo v. Stuart,* supra; see also, *State v. Blalock,* Cuyahoga App. Nos. 82080,82081, 2003-Ohio-3026.

There are, in essence, three prerequisites for a successful Crim.R. 33(A)(6) motion for a new trial. See, *State v. Shepard* (1983), 13 Ohio App.3d 117. First, a new trial may be granted on the grounds of newly discovered evidence only if the defendant could not, with reasonable diligence,

have discovered and produced the evidence at trial. Id. Second, the evidence must be truly new, not cumulative, and cannot be used merely to impeach or contradict prior evidence. *State v. Petro* (1947), 148 Ohio St. 505. Finally, the evidence must disclose a strong probability that it will change the result if a new trial is granted. Id.; *State v. Lewis* (1970), 22 Ohio St.2d 125. Although appellant claims he has met all three prerequisites, the record renders his claim baseless.

The only competent evidence appellant submitted to *the trial court consisted of the affidavits.* State v. Larkin (1996), 111 Ohio App.3d 516. In appellant's affidavit, he asserted that his trial attorney knew of "relevant documents" and "witnesses who could corroborate [his] defense," and "had the proof in his file" that exposed the "untruthfulness of" a portion of a prosecution witness' testimony. The other affidavits merely restated appellant's assertions.

A review of appellant's evidence demonstrates it fails to meet the three requirements for a successful new trial motion as set forth in *State v. Petro, supra. State v. Jackson* (1992), 82 Ohio App.3d 667; *State v. Bell* (1996), 112 Ohio App.3d 473.

First, it reveals he could have produced his evidence at trial. Second, he disputed a document that had been introduced, with its obvious defects, at trial; evidence that challenged the defects thus would have been merely cumulative. Finally, appellant, himself, took the stand at trial, thus permitting the jury to weigh his credibility with respect to his claim he had abandoned any desire to hire an assassin. Therefore, the "newly discovered" evidence fails to disclose a strong probability that it would change the result if a new trial were granted to appellant. State v. Richard, Cuyahoga App. No. 80428, 2003-Ohio-5959; *State v. Blalock, supra.*

Appellant further intimates he was deprived of a fair trial by his attorney's failure to call witnesses and to produce certain pieces of evidence. However, the decision to call a witness during the course of trial is a matter of trial strategy. *State v. Hunt* (1984), 20 Ohio App.3d 310. Counsel may have decided the jury would find the credibility of the testimony suspect. Similarly, appellant's assertions of misconduct at this juncture are speculative at best.

Based upon the record, therefore, the trial court did not abuse its discretion in denying appellant's motion for a new trial on the grounds of newly discovered evidence. *State v. Wells* (Oct. 22, 1998), Cuyahoga App. No. 73481.

Appellant's first and second assignments of error, accordingly, are overruled.

The trial court's order is affirmed. It is ordered that appellee recover of appellant its costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO
JUDGE

MICHAEL J. CORRIGAN, A.J. and
ANTHONY O. CALABRESE, JR., J. CONCUR

N.B.This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This

decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App. R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

The Supreme Court of Ohio

FILED
FEB 16 2005
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

State of Ohio
Appellee,
v.
Anthony Andrejic,
Appellant.

Case No. 04-1868

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; No. 84093).

/s/Thomas Moyer

THOMAS J. MOYER
Chief Justice